

Basics of the Unitary Patent system. Part 1: What is a Unitary Patent?

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Europe is preparing for the launch of the new Unitary Patent and the Unified Patent Court (UPC). A provisional phase for the UPC is expected to start later this year, with a view to a full start of the system in the spring of 2017. In a series of articles, Kluwer IP Law explains the upcoming changes and the consequences they have for patent practitioners. The first blogpost: What is a Unitary Patent?



1. Shall the Unitary Patent replace the existing European Patent?

No. The European patent as we know it, shall continue to exist. The Unitary Patent shall be a new option for patent applicants to acquire patent protection for the territory of (finally) 26 EU member states. The official name of the Unitary Patent is the 'European patent with unitary effect'. After the entry into force of the Unitary Patent Regulation (n°1257/2012), applicants shall have the choice to obtain a national patent, a European patent (of which the territorial protection depends on the member states for which the patent proprietor has validated its patent) or a Unitary Patent for the territory of all EU member states that have ratified the Agreement on the Unified Patent Court at the time of grant of the Unitary Patent (see question 7).

Given the fact that the Unitary Patent is an additional layer of patent protection, the situation shall occur that for certain inventions the patent proprietor shall acquire a European patent for the member states of the European Patent Organization which are not Unitary Patent member states (e.g. Switzerland, Turkey, Spain, Iceland, etc.) and at the same time shall acquire a Unitary Patent for the territory of the Unitary Patent member states.

2. How will I obtain a Unitary Patent?

The granting procedure for Unitary Patents shall be the same as for European patents. Before obtaining a Unitary Patent, the applicant first needs to obtain a European patent through the European Patent Office. After the grant of the European patent, the patent proprietor has to submit a 'request for unitary effect' to the European Patent Office within one month after the publication of the mention of grant of the European patent in the European Patent Bulletin. The request needs to be submitted together with the translation required by the Translation Regulation (n° 1260/2012).

3. Shall a Unitary Patent be cheaper than a European patent?

Yes and no. The costs of the examination phase before the European Patent Office shall be the same as for a European patent. However, in the post-grant phase, the Unitary Patent shall be significantly cheaper than a European patent validated in all Unitary Patent member states. First of all, the translation costs of the Unitary Patent shall be significantly less because you will only need one additional translation for the Unitary Patent, instead of translations in the different languages of the member states as currently is the case for European patents. Secondly, the renewal fees for a Unitary Patent shall be less than ¼ of the renewal fees for a European patent validated in 25 member states. During the first 10 years of the patent the cumulative renewal fees for a Unitary Patent shall be less than 5,000 EUR. For a European patent validated in 25 member states the total amount of renewal fees during the first 10 years is currently more than 29,500 EUR. For the whole 20 year duration of a European patent, the renewal fees amount to 158,621 EUR. The total renewal fees for a Unitary Patent shall only be 35,555 EUR.

If you only validate your European Patents in a small number of member states, it is possible that the European patent remains the cheaper option. As a rule of thumb, patent holders who validate their European patent in four member states or less, the European patent shall remain cheaper. However, your territorial protection is in such case also limited to these four member states (or less). If you choose for a Unitary Patent, you will have a broad protection in at least 13 member states (and in the end in 26 member states).

4. Which translations shall be needed to obtain a Unitary Patent?

If the language of proceedings before the European Patent Office was German or French, the specification of the patent shall need to be translated into English. If the language of proceedings before the European Patent Office was English, the request for Unitary Patent protection shall have to be submitted together with a translation into one of the official languages of the European Union. The European Patent Office shall not perform a quality check of the translation.

5. What is the difference between a European Patent and a Unitary Patent in terms of effect?

A Unitary Patent shall provide uniform protection and shall have equal effect in all Unitary Patent member states. The main consequence of such unitary effect is that a Unitary Patent can only be limited, transferred and revoked in respect of all participating member states. A classical European patent can be revoked in one member state and upheld in another member state.

In case the Unified Patent Court would judge that a party infringes a patent, this infringement shall be established for the whole territory of the Unitary Patent member states.

Although in case of transfer, a Unitary Patent is considered to be transferred for all the Unitary Patent member states, the Unitary Patent Regulation provides that a Unitary Patent may be licensed for the whole or part of the territories of the Unitary Patent member states.

6. Will I be able to invoke Unitary Patents in proceedings before national courts?

No. The Unified Patent Court shall have exclusive jurisdictions for disputes regarding Unitary Patents. This means that e.g. infringement and revocation actions regarding Unitary Patents cannot be brought before national courts. The situation for European patents shall be different. During a transitional period of 7 years (extendable with an additional 7 years) European patents can be judged by national courts or by the Unified Patent Court.

7. Shall a Unitary Patent from day one be granted for 26 member states?

No. A Unitary Patent shall have unitary effect only in those member states in which the Unified Patent Court has exclusive jurisdiction. Consequently, the territory of the Unitary Patent shall in the beginning be limited to those member states which have ratified the Unified Patent Court Agreement. In practice, this means that the territory of the Unitary Patent shall depend on the number of member states that had ratified the UPC Agreement at the date of the request for unitary effect. In the beginning, the Unitary Patent may only cover 13 EU member states, including France, Germany and the UK (i.e. the minimum number of member states required for the Unified Patent Court to become operational). Depending on the ratification speed of the member states, the unitary effect shall gradually grow up to 26 EU member states.

Pieter Callens (Eubelius, Belgium) is co-author of the book 'Introduction to the Unitary Patent and the Unified Patent Court'. An updated version of this book shall become available in 2016.

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